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## **Determination No. 10 -Telecommunication Provider Facility Relocation Recovery Surcharges (August 19, 2014)**

### **Purpose**

The purpose of this determination is to address telecommunication providers unilaterally assessing a surcharge on end-users to relocate telecom facilities in municipality public rights-of-way under the provisions of the Metropolitan Extension Telecommunications Rights-of-way Oversight Act (METRO Act), Act No. 48 P.A. 48 of 2002.

### **Background**

The METRO Act was created for the express purpose of streamlining and standardizing the public rights-of-way permitting process between the state's municipalities and telecommunication providers. The Act is the result of collaborative efforts between municipalities and telecom providers to address a historical problem related to telecom providers wishing to expand their services into or within the state's municipal (1,777) public rights-of-way. Prior to the Act, there was no standardization of permits and/or local permit fee structures. The Act provides for telecom providers with facilities in public rights-of-way to pay the Metro Authority an annual maintenance fee for access to and use of public rights-of-way. These provider payments are annually distributed to all eligible municipalities. To offset the annual telecom provider maintenance fee assessments, the Act provides that a telecom provider can receive a tax credit for the full amount of the annual maintenance fee paid as the "sole" recovery of costs of services to end-users.

### **METRO Act and Permit Agreement Provisions**

The METRO Act and Permit Applications/Agreements between municipalities and telecommunication providers specifically prescribe the recovery of relocation cost of provider facilities in municipal public right-of-way as follows:

1. Section 1(2)(h) of the METRO Act indicates that a tax credit, per Section 8(14) of the Act, is the **sole** means by which telecom providers can recover costs under the METRO Act; and that telecom providers cannot pass such costs on to end-users through rates and surcharges for their telecommunication services.
2. Section 3(2) of the METRO Act provides that the Director of the Metro Authority is responsible for carrying out the powers and duties of the Authority under the METRO Act.
3. Section 8(14) of the METRO Act provides that a telecommunication provider may apply to the MPSC for a determination of the maximum amount of an annual credit available

under section 13b(5) of 1095 PA 282, MCL 207.13b. Each application shall include sufficient documentation to permit the MPSC to accurately determine the allowable credit; and, except as provided under subsection (15), issue its determination within 45 days from the date of application. A provider is not eligible to receive this credit without certification by the MPSC that the documentation provided verifies that (a) the amount of the annual maintenance fee paid by the provider, and (b) that the provider's rates and charges for basic local exchange service, including revenues from intrastate subscriber line or end-user line charges, do not exceed the MPSC's approved rates and charges for those services. A provider will be deemed eligible to receive a tax credit when the provider files documentation of verification that the provider's rates and charges for basic local exchange service, including revenues from intrastate subscriber end-user line charges, do not exceed the MPSC's approved rates and charges for those services.

4. Section 8(17) of the METRO Act provides that "The tax credit allowed under subsections (14) and (15) shall be the sole method of recovery for the costs required under this act. A provider shall not recover the costs required under this act through rates and charges to end-users for telecommunication services." [Emphasis added]
5. Section 4.6 of the METRO Act permit agreements prescribed by the MPSC between municipalities and telecommunication providers states: "...The construction and installation of the Telecommunication Facilities shall be performed pursuant to plans approved by Municipality ..." and "...Permittee shall, at its expense, place such portion of its Telecommunication Facilities underground..."
6. Section 4.10 of the METRO Act permit agreements requires "...If a Municipality requests Permittee to relocate, protect, support, disconnect or remove its Facilities because of street or utility work, or other public projects, Permittee shall relocate, protect, support, disconnect, or remove its Facilities, at its sole cost and expense..."

### **Analysis/Determination**

The abovementioned provisions of the METRO Act and Permit Agreements clearly illustrate that telecommunication providers cannot charge end-user customers a surcharge to relocate their telecommunication facilities in municipal public rights-of-way and also receive the annual tax credit provided under Section 8(14) of the METRO Act.

Section 8 of the METRO Act requires telecommunication providers to pay the Metro Authority an annual maintenance fee for access to and use of municipal public rights-of-way which, per Section 13 of the Act, is distributed to eligible municipalities. The tax credit available to telecom providers under Section 8(14) of the Act provides that they receive an annual property tax credit equal to the funds/costs paid in annual maintenance fees. The receipt of this tax credit results in the telecom provider paying little or no annual costs for access to and use of municipal public rights-of-way. Further, aside from violating the METRO Act and permit agreements, a telecom provider assessment on end-user customers of a surcharge to recover costs to relocate telecom facilities already covered by the tax credit, is equivalent to receiving a double recovery of such costs.

Thusly, effective immediately, the Metro Authority deems that a telecom provider's surcharge on end-user customers to relocate telecom facilities in municipal public rights-of-way as a violation of the METRO Act; and subjects a violator to the provisions of Section 18 of the Act, which may include action by the MPSC to:

- Issue remedies and penalties to protect and make whole persons who have suffered an economic loss resulting from a violation.
- Assess payment of fines for failure to pay undisputed fee assessments or violations of the Act (up to \$40,000.00/day).
- Condition or amend a telecom providers permit allowing access to and use of municipality public rights-of-way.
- Issue cease and desist orders.
- Order the payment of attorney fees and actual costs of persons that do not provide telecom services to 250,000, or more, end-users

**Section 17 of the METRO Act provides that a decision or assessment of the Metro Authority is subject to a de novo review by the MPSC upon the request of an interested person.**